No. 15145

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

## BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States for the District of Montana

### NAMES AND ADDRESSES OF ATTORNEYS

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United States Attorney,
for the District of Montana,
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## STATEMENT OF CASE

This civil action was brought by the United States of America under the provisions of Section 2(a)(6), Title III of the Second War Powers Act (56 Stat. 176, 50 App. U.S.C. 633), Sections 7(a) and 7(c) of the Veterans Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. App. Section 1821 et seq.), and Section 24 of the Judicial Code (54 Stat. 143, 28 U.S.C.A. 41). The action was brought to require the defendant to make restitution to certain named purchasers of overcharges above the maximum ceiling price set by the Federal Housing Administration and for the value of construction deficiencies in the sale of the dwellings, in violation of Priorities Regulation 33, issued pursuant to the Veterans Emergency Housing Act of 1946, *supra*.

Under the provisions of Title III of the Second War

Powers Act of 1942, as amended (56 Stat. 176, Title 50, App. U.S.C.A. Section 633) and Executive Orders issued thereunder, the Civilian Production Administration issued Priorities Regulation 33, effective January 16, 1946. Subsequently, on August 27, 1946, the Housing Expediter in Housing Expediter Priorities Order 1 (11 F.R. 9507) delegated to the Civilian Production Administration, the priorities and allocation powers contained in Sections 4 and 7 of the Veterans Emergency Housing Act of 1946. The Civilian Production Administration exercised such powers in the issuance of amendments to Schedule A of Priorities Regulation 33, and said regulation was, by virtue of said amendment, after August 27, 1946, continued in effect under the authority of both the Second War Powers Act of 1942, as amended, and the Veterans Emergency Housing Act of 1946. Subsequently, pursuant to the provisions of Housing Expediter Priorities Order 5, effective April 1, 1947 (12 F.R. 2111) and Executive Order 9836 (11 F.R. 1939), the Housing Expediter continued in effect said Priorities Regulation 33 under the Veterans Emergency Housing Act of 1946 alone, until December 31, 1947.

## PREVIOUS APPEAL AND PROCEEDINGS

This case was previously appealed (No. 13,267, 209 F2d 604) by these appellants from the District Court's Order on Motion for Summary Judgment (Tr. 135 et seq.) entered November 19, 1951, relative to the special improvement charges the purchasers were required to pay in addition to the maximum sales price established by the Federal Housing Administration, hereafter referred to

as F.H.A. This Court remanded the cause for further proceedings to determine whether the houses, or any of them, had been sold in excess of the maximum price of $8,000.00, and with reference to appellee's contention that a summary judgment was required as a matter of law, this Court said:

> "In any event, this could not be so unless an admission was made that these levies required the purchasers to pay an amount in excess of the maximum price of $8,000.00 which, as we have pointed out, is specifically denied."

After the former appeal further proceedings were had by a hearing before a Special Master appointed by the District Court (Tr. 155, 156) on the issues of fact pertaining to the overcharges and the "construction defects and omissions" as alleged in appellee's Amended Complaint. The Special Master filed his report (Tr. 156-161) finding that in addition to the maximum established sale price of $8,000.00, each purchaser named in his report, or the successor in interest, was charged or paid specific sums for street and utility improvements. The Special Master also made a finding as to the reasonable value of the "construction defects and omissions" for each house involved in this action.

Objections to the Special Master's Report were filed by appellants, following which the District Court made and filed its Order on January 6, 1956. (Tr. 206-222). A judgment based upon the Court's findings, conclusions and decision was filed and entered February 24, 1956 (Tr. 223-226). The foregoing Order and Judgment con-

stitute appellants' Specification of Errors No. 1 and No. 2. (Appellants' Brief 5).

## ADMISSIONS IN APPELLANTS' ANSWER

In addition to appellants' statement of the case (Appellants' Brief 3, et seq.) it must be observed that the Answer of appellants (Tr. 40, et seq.) admits among other things that they applied for and on or about July 1, 1946, received authorization for priorities assistance to construct 27 dwelling units in Montana; "that on or about November 4, 1946, the Federal Housing Administration on application of these defendants (appellants) established a maximum sales price of $8,000.00 for each such dwelling unit, the first such price so established theretofore of $6,000.00 having been first so increased to $6,465.00 per unit; that the increases so established in the maximum sale price of each dwelling unit aforesaid were made at the request of these defendants and upon the basis of certain written specifications of date June 4, 1946, and a certain written description of the requisite materials, dated June 15, 1946, both submitted by these defendants to the Federal Housing Administration, and further of the certain plans tendered therewith covering the construction of the types of dwelling units aforesaid, viz., Type I and Type 1-a, which were then and there under construction and also upon the basis of certain written estimates and breakdowns of construction costs entering into the units so under construction or to be constructed, and that the final maximum sales price of $8,000.00 for each dwelling unit aforesaid was duly approved." (Tr. 42 and 43). "They admit that they used Priorities Applica-

tion No. 6-093-269 to obtain some building materials actually used in the construction of the dwellings more particularly described in Exhibit A, pages 1 to 24, to the plaintiff's (appellee's) Amended Complaint annexed. * * * They admit that after the issuance by the Federal Housing Administration of authorization as aforesaid for priorities assistance these defendants (appellants) completed the construction of, and sold, twenty-five buildings under the said priority, and of the dwelling units identified by the Federal Housing Administration serial numbers aforesaid." (Tr. 43). They further admit they petitioned the county authorities to create a special improvement district for the construction of water mains, sewers, concrete curbs, gutters and oil mix pavements, which district was approved November 8, 1946 (four days after the final maximum sales price was established); and that on July 28, 1947, the special improvement assessments became a lien against all the property in the district and thereafter was regularly assessed for the improvements, and that A. W. Hartwig Construction Company was paid for the construction of those special improvements.

## ISSUES

From the Amended Complaint and Answer, it appears the issues raised by appellants in this appeal are as follows:

1. Is the District Court's findings, conclusions and decision (Tr. 206-222) and its Judgment (Tr. 223-226) clearly erroneous under Rule 52 (e)(2) F.R.C.P.?
2. Was appellee's cause of action defeated by the repeal

of the Veterans' Emergency Housing Act of 1946 (supra)?

3. Was it required that the special improvement charges be included in the maximum sales price of $8,000.00 for each dwelling, "including the land and all improvements (including garage if provided)"?
4. Were the "construction defects and omissions" properly approved by the F.H.A.?

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## ARGUMENT

### I.

### CONSTRUCTION OF RULE 53(e)(2)

Rule 53(e)(2) provides in the relevant parts:

> "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. . . . The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

This rule has been construed to put the burden upon the appellants in this appeal to show where the adoption or modification of the master's findings is clearly erroneous. *Glens Falls Indemnity Co.* v. *United States*, 9 Cir., 1955, 229 F. 2d 370, 373.

It has also been held that the trier of the fact, whether commissioner, master, referee or judge, will be sustained on appeal or review unless they are clearly erroneous, *(In re McNay,* D.C. Cal., 1945, 58 F. Supp. 960) therefore the construction given to the words "clearly erroneous" in Rule 52 (a) F.R.C.P. may also be cited as authority in this particular argument.

Rule 52 (a) has been construed by this Circuit in numerous cases and is well defined in *Gamewell Company* v. *City of Phoenix*, 9th Circuit, 216 F. 2d, 928, wherein it is stated:

> "The Findings stand before us with the presumption of validity unless they are clearly erroneous. (Rule 52 (a), Federal Rules of Civil Procedure.) The object of the clause as to the effect of findings is to give to findings the effect which they formerly had in equity. *United States* v. *Gypsum Co.*, 1948, 333 U.S. 364, 395. The aim is to
>
> '. . . make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only "clearly erroneous" findings.' *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 1949, 336 U.S. 271, 275."

This advantage has been well stated by the Court of Appeals for the Second Circuit:

> "For the demeanor of an orally-testifying witness is 'always assumed to be in evidence.' . . . The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court; by his manner, his intonations, his grimaces, his gestures, and the like—all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned." *Broadcast Music, Inc.*, v. *Havana Madrid Restaurant Corp.*, 2 Cir., 1949, 175 F. 2d, 77, 80.

Conversely, the Supreme Court has held that a finding is clearly erroneous when

> ". . . although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.*, supra, p. 395.

To the same effect is *United States* v. *Oregon Medical Society,* 1952, 343, U.S. 326, 339.

and also *Lew Wah Fook* v. *Brownell,* 9th Cir. 218 F. 2d, 924:

> "So far as we have seen, this is the plainest of cases in which we are asked to retry the facts. Appellant asks us to apply the doctine of the case of *United States* v. *United Gypsum Co.,* 333 U.S. 364-395, wherein it is held, 'Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings of administrative agencies or by a jury, this court (Supreme Court and this court, too, of course) may reverse findings of fact by a trial court where "clearly erroneous." . . . A finding if clearly erroneous where although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.' This simple statement does not convert the appellate tribunals into fact finding de novo trial courts. The presumption of correctness of the trial court, the view of the witnesses and the live feel of the open forum are all ingredients of the compound which we may adjudge as valid or 'clearly erroneous.' By this test in the instant case, the judgment is not clearly erroneous. However, even if we should approach the problem as the original triers of fact upon the bare record, our conclusion would be the same. We briefly digest sufficient of the evidence to support our conclusions."

and with reference to conflicting evidence the Court states, in *Carr* v. *Yokohama Specie Bank, Limited,* 9th Cir., 200 F. 2d, 251:

> ". . . where there is, as here, a conflict in the evidence it becomes the duty of the trial court to appraise all facts adduced in proof and it is not clearly erroneous for that Court to choose between two permissible and conflicting views as to the weight of the evidence.

*Bjornson* v. *Alaska S.S. Co.*, 9 Cir., 193 F. 2d, 433. We may not disturb such a choice by the trier of the facts. On the record made in this case we must and do conclude that the findings of fact are not clearly erroneous."

## II.

## PLAINTIFF'S CAUSE OF ACTION IS NOT DEFEATED BY THE REPEAL OF THE VETERANS' EMERGENCY HOUSING ACT OF 1946.

The established policy of Congress with respect to liabilities incurred under a statute which is thereafter repealed is stated in 1 U.S.C. 109 which provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the repealing Act shall so expressly provide,* and *such statute shall be treated as still remaining in force for the purpose of sustaining any proper action* or prosecution *for the enforcement of such* penalty, forfeiture, or *liability.* The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. (Italics added.)

Since it is conceded that the sale of all dwellings referred to in the complaint occurred prior to the repeal of the Veterans' Emergency Housing Act of 1946 on June 30, 1947 (see *A. W. Hartwig,* v. *United States,* 209 F. 2d, 604 (C.A. 9), the quoted provisions of 1 U.S.C. 109 are

clearly applicable.[1] 1 U.S.C. 109 is but a codification of R.S. 13, adopted in 1871, as amended. H. Rep. 251, 80th Cong., 1st Sess.; S. Rep. 658, 80th Cong., 1st Sess. Thus, the policy of Congress authorizing the enforcement of causes of action arising prior to the repeal of statutes subsequent to such repeal is one of long standing and this is the policy which was in effect when the Veterans' Emergency Housing Act of 1946 was repealed. Thus, contrary to the representations of counsel for the appellants, the only change of policy effected by the repeal of the 1946 Act was with respect to sales consummated *subsequent* to June 30, 1947. Cf. *United States* v. *Fortier,* 342 U.S. 160.

As the Supreme Court has said of 1 U.S.C. 109:

> "By the General Savings Statute Congress did not merely save from extinction a liaiblity incurred under the repealed statute; it saved the statute itself:
>
> 'and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability.'
>
> We see no reason why a careful provision of Congress keeping a repealed statute alive for a precise purpose, should not be respected when doing so will attain exactly that purpose."

*De La Rama S.S. Co.* v. *United States,* 344 U.S. 386. Accord, see *United States* v. *McNair,* 180 F. 2d 273 (C.A.

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1 Although appellants' first argument is denominated "The amended complaint herein does not state a cause of action in either of the counts pleaded," the argument thereunder is confined to the narrow contention that appellee's claim is defeated by the repeal of the Veterans' Emergency Housing Act of 1947. The Government's reply is accordingly similarly limited in scope. As a practical matter, the same argument was advanced by appellants in connection with their objections to Master's Report (Tr. 172 et seq.) and answered appellee. By accepting and approving the findings and conclusions of the Special Master (Tr. 208) in the face of appellants' brief, the district court has rejected the argument presented by appellants.

9) decided by the United States Court of Appeals for this Circuit. The same savings statute has been applied with the same results in respect to causes of action which accrued under the provisions of the Veterans' Emergency Housing Act of 1946 and prior to its repeal.[2] *United States* v. *Carter,* 171 F. 2d 530 (C.A. 5); *Rheinberger* v. *Reiling,* 89 F. Supp. 598, 601 (D. Minn.); and see *United States* v. *Fortier,* 342 U.S. 160, Footnote 3.

The presence of a savings clause in the statute which repealed the Veterans' Emergency Housing Act (see Page 7 of appellants' brief) does not serve to render the general savings statute (1 U.S.C. 109) inapplicable.[3] Speaking of the savings provision quoted by appellants, the court in *United States* v. *Carter,* 171 F. 2d 530, 532 (C.A. 5) said:

> "We interpret the foregoing language to be an expression of the intent of Congress to retain in full force and effect all orders, commitments, regulations, and remedies relating to veterans' housing which have accrued prior to the date of the 1947 Act. At any rate,

2 Dictum quoted from *Sedivy* v. *Superior Home Builders,* 188 F. 2d 729 (C.A. 7) cannot help appellants in the face of the terms of the general saving statute and the foregoing authorities. *Sedivy* does not consider these and involves an entirely different question, *viz.,* the limitation which is clearly inapplicable in an action by the Government such as in the instant case. *United States* v. *See,* 194 F. 2d 100 (C.A. 9) and cases cited therein. Appellants' reliance upon dictum in *Woods* v. *Richman,* 174 F. 2d 614 (C.A. 9) is similarly misplaced. No consideration was there given to the saving statute. The more recent decision of the same court in *United States* v. *McNair,* 180 F. 2d 273 (C.A. 9) dispels any doubt as to the result that should be reached in view of the applicable saving statute.

3 The district court decision of *Wilmington Trust Co.* v. *United States,* 28 F. 2d 205 (D. Del.) cited by appellants in fact turns upon the court's conclusion that the tax in dispute had not accrued upon the date on which the Tax Act was repealed. There is no question but that liability had accrued under the facts of the instant case prior to the repeal of the applicable statute. The *Wilmington Trust Co.* case has in fact been discredited even upon the proposition upon which it was decided. See *Schoenheit* v. *Lucas,* 44 F. 2d 476, 490 (C.A. 4); *Burrows* v. *United States,* 56 F. 2d 465. (Ct. Cls.).

> the foregoing language is the antithesis of the express language that Section 109 requires of a statute in order to repeal pre-existing remedies."

As 1 U.S.C. 109 provides "The repeal of any statute shall not have the effect to release or extinguish any * * * liability incurred under such statute, unless the repealing Act shall so *expressly* provide * * * ." (Italics added.) Cf. *Fleming* v. *Mohawk Co.,* 331 U.S. 111, Footnote 11. There is no such provision in the Housing and Rent Act of 1947, 61 Stat. 193.

Section 1(b) of the Veterans' Emergency Housing Act of 1946 reads:

> The provisions of this Act, and all regulations and orders issued thereunder, shall terminate on December 31, 1947, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the provisions of the Act are no longer necessary to deal with the existing national emergency, whichever date is the earlier."

And there was also incorporated in said 1946 Act the following:

> "Section 5. * * * Notwithstanding any termination of this Act as contemplated in section 1(b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, as to rights or liabilities incurred or offenses committed prior to such termination date, for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

The foregoing parts of the 1946 Act provide additional evidence that the intention of Congress was to have the legal remedies continue in force. Specific, direct and unequivocal language in the repeal statute was then manda-

tory to defeat the applicability of 1 U.S.C. § 109 above quoted. The so-called repealing Act (Housing and Rent Act of 1947, supra) does not "so expressly provide" as required to give appellants' argument any weight whatever.

In a case where the same contention obviously was urged by defendants under a similar action brought by a purchaser to recover overcharges, after quoting the saving clause in the repealing Act (Housing and Rent Act of 1947), the Court said:

> "I am of the opinion that this saving clause in the repealing of the statute is not so plainly in conflict with the general rule of statutory construction established by Title 1 U.S.C.A. 109 as to make that Section (109) inapplicable. The statutory rule of construction there provided is that the repeal of a statute shall not have effect to release or extinguish a liability incurred under such statute unless the repealing act shall so expressly provide. There is no such provision in the Act of June 30, 1947, and it follows that the Act of May 22, 1946, 'shall be treated as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability.' (Sec. 109)." *Pruitt* v. *Litman,* E.D. Pa. 1949, 89 F. Supp. 705, 706.

From the foregoing, it is clear that repeal of the Veterans' Emergency Housing Act did not have the effect of forgiving all prior violations *nunc pro tunc.*

## III.

## DEFENDANTS ARE LIABLE FOR THE SPECIAL ASSESSMENTS.

In the district court's decision of July 30, 1951, (Tr. 121-127) it was stated, "This court decided on the de-

fendants' motion to dismiss that the maximum price established under the provisions of Priorities Regulation 33 *must* include the land upon which the dwelling is situated and *all* improvements." (Italics added.) Cf. Priorities Regulation 33 quoted in part at Pages 18 and 19 of appellants' brief. The thrust of their second argument is aimed at excluding items for which special assessments have been levied from the meaning of the term improvements. In setting up this argument, counsel has attempted to draw a distinction without in fact showing that there is a difference. This is clearly demonstrated by the facts of the instant case.

The plans and specifications filed by appellants for the purpose of obtaining priorities assistance at first called for the installation of septic tanks, an *improvement* for which special assessments are not made. The authorized maximum price was established for the dwellings in the development undertaken by the appellants on the basis of the plans and specifications submitted which included the septic tanks. Thereafter the plans were changed to substitute sewers for septic tanks. The appellants would now have the court believe that a sewer is not an improvement which they were required to furnish with the dwellings constructed by them with priorities assistance for a designated maximum price although, under their definition of improvements, a septic tank is an improvement which was to be furnished within the maximum price authorized. No exercise in semantics can justify so flagrant a disregard of the realities of the situation. The regulation speaks of "*all* improvements," not just those which could not be

installed and paid for through public improvement projects and special assessments.[4]

It requires no citation of authority to establish that where the words of a statute or regulation are clear on their face there is no need to resort to the so-called aids of construction, as appellants have done in their brief. The conduct of the parties, the facts recited in the district court's opinion of July 30, 1951, the matters placed in evidence in the hearing before the Special Master, and the reasons stated in the findings, conclusions and decision herein appealed, all point irresistably to the conclusion that the items covered by special assessments were to have been furnished by the defendants without charge in excess of the maximum price established for the dwellings. Substance and not form controls equitable proceedings. Appellants cannot by the expedient of organizing a special improvement district (1) escape their obligation to the purchasers of the dwellings, and (2) avoid the maximum price restrictions imposed under the priorities assistance program. The appellants are liable for the special assess-

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4 As a practical matter, regulations were promulgated to implement Priorities Regulation 33 by establishing certain minimum requirements and significantly these regulations provided that:

> The "HH Minimum Property Requirements" shall be the same as the "Property Standards," "Minimum Construction Requirements," and "Minimum Requirements for Rental Housing," as established for the area and amended from time to time by the Federal Housing Administration under the National Housing Act insofar as they apply to the structure itself and its *water supply* and *sewage disposal systems*, or as modified by rulings or standards issued by the National Housing Agency on special methods of construction or substitute materials.

24 C.F.R., 1946 Supp. 707.16. Specific reference to sewage disposal systems in this regulation makes it clear that such items were within the contemplation of the regulation and undoubtedly intended to be included within the term "all improvements."

ments and the plaintiff is entitled to the relief prayed for in its complaint.

The fortuitous circumstance by which the lien for the special assessment attached to the property subsequent to the date of the warranty deed given therefor by defendants cannot relieve them of responsibility. As this court observed in its opinion of July 30, 1951: (Tr. 124)

> "It appears from the application for mortgage insurance there would be no indebtedness other than the mortgage loan applied for, which would indicate to the Federal Housing Administration and the bank in question that the purchasers of the dwellings under the project would have no special improvement tax assessed against their property; also to the same effect the answers of defendants Hartwig under item No. 7 of the sub-division Information Form submitted to Federal Housing Administration for the issuance of mortgage insurance, in which he said that purchasers of the dwellings would be required to pay no special assessments, and that all contemplated street and utility improvements to be installed by developer were included in sale price."

"The liability for the lien is there as soon as the improvement is made *(Dougherty* v. *Miller,* 36 Cal. 83)," *Swords* v. *Simineo,* 68 M. 164, 216 P. 806.

This is clearly a case in which equity should order done that which ought to have been done initially by the defendants.

## IV.

## APPELLANTS ARE RESPONSIBLE FOR CONSTRUCTION DEFICIENCIES AND OMISSIONS WHICH RESULTED IN UNAUTHORIZED OVERCHARGES TO THE PURCHASERS.

The facts of this case amply demonstrate that the appellants are responsible for construction deficiencies and omissions which resulted in substantial overcharges as indicated in the report of the Special Master. Appellants seek to excuse these defects and omissions and avoid the necessity of making restitution therefor by relying upon a compliance inspection report of the Federal Housing Administration. Appellants' Brief (see Pages 23 and 24) itself indicates that the report is dated October 23, 1947, a date nearly four months *subsequent* to the repeal of the Veterans' Emergency Housing Act; that the report bears the certificate of the chief underwriter of the Federal Housing Administration; that the underwriter indicated on the report that a firm commitment had been made by Federal Housing Administration; and that closing papers might be submitted under these circumstances all point positively to the fact that the purpose of the inspection report at that late date was to secure Federal Housing Administration insurance for the benefit of the builder.

Even if the inspection report is considered to indicate acquiescence in deviations from the plans and specifications filed by the appellants with their application for priorities assistance, it is manifest the Government cannot be held to be bound thereby. As amended (see 11 F.R. 4085), Priorities Regulation 33(3) requires that:

> "A builder who constructs, converts, alters or repairs housing accommodations under this regulation must do the work in accordance with the description given in the application, except where he has obtained *written approval* for a change from the agency which approved the original application." (Italics added.)

Cf. *United States* v. *Austin,* 100 F. Supp. 33, 42 (D. Md.). The written approval contemplated by the regulation was to be given by the Federal Housing Administration office to which the original application was submitted *upon application therefor by the builder.* Inspectors were, of course, bound to observe the terms of the regulation and see that the work was done in accordance with plans and specifications and were not authorized to sanction that which the regulation prohibited.

In administering the priorities assistance program, the Government was acting in a sovereign capacity and so acting it could not be bound by the unauthorized acts of agents who approved construction which did not in fact comply with approved plans and specifications and minimum construction requirements. *Filor* v. *United States,* 9 Wall. 45; *Utah Power & Light Co.* v. *United States,* 243 U.S. 389; *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380; *Bank of Arizona* v. *United States,* 73 F. 2d 811 (C.A. 9); and see the opinion of this court filed herein on July 30, 1951 (Tr. 121-125). Anyone dealing "with the government takes the risk of having ascertained that he who purports to act for the government stays within the bounds of his authority." *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380.

> Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned

to the detriment and injury of the public. *Whiteside* v. *United States,* 93 U.S. 247, 257.

If appellants desired to make substitutions or changes in the plans and specifications upon the basis of which the maximum prices were established, it was their duty to make application to the office in which these plans and specifications were filed at the time the changes were desired.

Appellants' suggestion that every completed inspection report is a formal "judgment" of binding force upon the Government ignores the realities of Government operations. Nor can it be squared with the authorities cited in the preceding paragraph. Moreover, the functions conferred by the Veterans' Emergency Housing Act are expressly exempted from the coverage of the Administrative Procedure Act. 5 U.S.C. 1001.

## CONCLUSIONS

1. Based upon the evidence and the law the district court's findings, conclusions and decision and its judgment are not clearly erroneous, but rather substantially supported.

2. The appellee's cause of action was not defeated by the repeal of the Veterans' Emergency Housing Act of 1946, supra, or for any other reason.

3. The special improvement charges were represented to the purchasers to be included in the maximum sales price, and in fact were charged to and paid by said purchasers in excess of the maximum sales price. Further, one of the price increases was based upon additional costs of installing a public sewer rather than a septic tank, and

the Federal Housing Administration understood the special improvement charges would be included in the maximum sales price.

4. The deviations in the construction of the houses were not approved by the Federal Housing Administration prior to the sale of each house, or at all, in the manner contemplated by the regulations, and any so-called approval by a representative of the Federal Housing Administration was without authority to bind the Government under its priorities program. Approval for any other purpose is not material.

Finally, it is urged that the evidence and the law require the lower court's findings, conclusions and decision and its judgment be affirmed.

Respectfully submitted,

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